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August 27, 2012

Jeff S. Jordan  
Federal Election Commission  
999 E Street, NW, 6th Floor  
Washington DC 20463

OFFICE OF THE CLERK  
2012 AUG 27 PM 3:46  
FEDERAL ELECTION COMMISSION

Re: **Response to Complaint, MUR 6603**

Dear Mr. Jordan:

On behalf of Patriot Majority USA, this letter responds to the complaint received on July 12, 2012. The complaint is premised on a factual error – that Patriot Majority USA coordinated the ad with Ben Chandler – and an incorrect reading of the republication rules. Because the ad was not a "coordinated communication" and because it did not "republish" campaign materials, the Commission should dismiss the complaint and close the file.

**FACTUAL BACKGROUND**

Patriot Majority USA is a nonprofit organization that has been recognized by the Internal Revenue Service as tax-exempt under section 501(c)(4) of the Internal Revenue Code. Its primary purpose is to educate the public on policies that will effectively create jobs, improve investment opportunities, and foster economic development that benefits all American workers, their families, and employers. It is not registered as a political committee with the Commission, as its "major purpose" is not federal campaign activity.<sup>1</sup>

On June 18, 2012, Patriot Majority USA began running grassroots lobbying communications in Georgia, Kentucky, and West Virginia, opposing "the Ryan Budget and its plans to essentially end Medicare as we know it."<sup>2</sup> The ad ran in districts

<sup>1</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1974). The complaint, on page 4, incorrectly refers to Patriot Majority USA as a political committee.

<sup>2</sup> Patriot Majority USA Press Release, "New TV Ads in GA, KY, & WV: Patriot Majority USA Urges Rejection of Ryan Plan to Essentially End Medicare" (June 20, 2012), *available at*

represented by Republican David McKinley and Democrats John Barrow and Ben Chandler, praising each congressman for opposing the Ryan Budget and asking their constituents to thank them for doing so. The nonpartisan script and many of the visuals for each ad is identical, except for the name of the congressman. The purpose of the ads was to help convince the congressmen of both parties to continue their opposition to the Ryan Budget's proposals during the next budget vote.

The ad featuring Rep. Chandler begins with stock footage of a woman looking at her prescription drugs, with the narrator intoning, "For her, it's about affordable prescriptions."<sup>3</sup> The ad then cuts to an image of a man in a hospital bed, over the audio, "For him it's a critical lifeline after a lifetime of hard work." The ad then describes the threat to Medicare by "some in Washington" and shows an image of the Capitol dome. Twelve seconds into the ad, the narrator tells viewers that Rep. Chandler opposed the plan to end Medicare and, for background imagery, the ad uses two-second and one-second clips of Rep. Chandler, excerpted from publicly available videos posted on his campaign's YouTube channel. For the next five seconds, the ad returns to stock footage of a woman in a wheelchair and two women discussing prescription drugs. Finally, the ad closes with a "call to action" and, in the background, uses two five-second clips excerpted from videos on the same YouTube channel. The excerpts do not include audio or on-screen text. A full chart of the ad is below:

TIME	AUDIO	ON-SCREEN	SOURCE
:00	"For her, it's about affordable prescriptions."	Image of woman looking at prescriptions.	Stock footage.
:04	"For him, it's a critical lifeline after a lifetime of hard work."	Image of man in hospital bed.	Stock footage.
:09	"But some in Washington want to end Medicare."	Image of Capitol dome.	Stock footage.
:12	"Ben Chandler said no way."	Image of Chandler talking with law enforcement personnel.	YouTube video from reelectbenchandler channel. <sup>4</sup>
:14	"Chandler fought against raising the eligibility age for Medicare."	Image of Chandler talking with farmer.	YouTube video from reelectbenchandler channel. <sup>5</sup>
:15		Woman in wheelchair.	Stock footage.
:18	"Prevented a new Medicare doughnut hole."	Two women discussing prescription drugs	Stock footage.
:20	"And opposed those who'd	Image of Chandler	YouTube video from

[http://patriotmajority.org/system/storage/4/326/PMUSA News Release -- New TV Ads in GA KY WV-- 6-20-2012.pdf](http://patriotmajority.org/system/storage/4/326/PMUSA_News_Release_-_New_TV_Ads_in_GA_KY_WV--_6-20-2012.pdf)

<sup>3</sup> <http://www.youtube.com/v/tVx7Co3r6XU&rel=0>.

<sup>4</sup> [http://www.youtube.com/watch?v=a\\_cSGrp3lps&feature=channel&list=UL](http://www.youtube.com/watch?v=a_cSGrp3lps&feature=channel&list=UL).

<sup>5</sup> <http://www.youtube.com/watch?v=RNJQjiXDxtA&feature=relmfu>.

	increase costs on seniors by six thousand a year."		reelectbenchandler channel. <sup>6</sup>
:25	"Tell Ben Chandler to keep fighting to protect Medicare and balance the budget the right way."	Image of Chandler	YouTube video from reelectbenchandler channel. <sup>7</sup>

As noted above, Patriot Majority USA obtained all video excerpts that feature Rep. Chandler from his publicly available YouTube channel. The complainant's allegation that the videos are no longer available on YouTube is incorrect. To this day, any member of the public may view and download the videos at <http://www.youtube.com/user/reelectbenchandler>.

### LEGAL DISCUSSION

The complaint alleges that the ad praising Rep. Chandler's opposition to the Ryan Budget was a "coordinated communication." That allegation is false. An ad is a "coordinated communication" only when it satisfies *both* the "conduct prong" and the "content prong," as set forth in section 109.21 of the regulations.<sup>8</sup> This ad satisfies neither. As a result, the complaint should be dismissed.<sup>9</sup>

#### A. Conduct Prong

The complainant's contention that the "conduct prong" is met hinges on the allegation that the campaign removed the videos from the Internet shortly after it first posted them. But this allegation has no merit. The campaign videos from which the excerpts were obtained are currently available on the Chandler campaign's YouTube channel and can be accessed there by any member of the public. To the knowledge of Patriot Majority USA, these videos were never removed from that channel.<sup>10</sup>

The complaint offers no other specific factual allegations on which to base a coordination claim. It speculates, without any basis, that the use of publicly available footage means *ipso facto* that the ad was coordinated. This is a simply implausible claim – Patriot Majority USA ran ads with nearly identical scripts in other districts concurrently with the ad featuring Rep. Chandler, including an ad praising a Republican congressman. Moreover, "[u]nwarranted legal conclusions from asserted facts ... or mere speculation

<sup>6</sup> <http://www.youtube.com/watch?v=jrYvmjujT0&feature=channel&list=UL>.

<sup>7</sup> <http://www.youtube.com/watch?v=-UurW99bpbE&feature=channel&list=UL>.

<sup>8</sup> 11 C.F.R. §§ 109.21(c), (d). An ad must also satisfy the "payment prong." *Id.* 11 C.F.R. § 109.21(a)(1).

<sup>9</sup> Because the ad did not disseminate, distribute, or republish campaign materials, there is no prohibited contribution under 11 C.F.R. § 109.23 either. The complaint does not refer to § 109.23.

<sup>10</sup> See *supra* at footnotes 4-7.

... will not be accepted as true" by the Commission.<sup>11</sup> The law "does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges."<sup>12</sup> Because the complaint offers no facts on which to base a claim that the "conduct prong" has been met, it should be dismissed.

B. Content Prong

The complaint also fails to show that the "content prong" has been met. The complaint points to the use of clips from the YouTube footage and alleges that this "clearly meets the content standard addressing dissemination, distribution, or republication of materials prepared by a candidate's authorized committee." But as the Commission's regulations and precedents demonstrate, the incidental use of publicly available video excerpts do not constitute "republication," particularly where, as here, the excerpts do not contain any discernible message of their own and are used solely to provide background imagery. Therefore, the content prong is not met.<sup>13</sup>

The purpose of the republication rule is to "distinguish[] between independent expressions of an individual's views and the use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash to a candidate."<sup>14</sup> As the Commission has held on many occasions since the Act's inception,<sup>15</sup> not every third party use of candidate campaign materials is "republication" under the Act. While the "wholesale copying of candidate materials constitutes republication," the "partial use of such materials in connection with one's own protected speech is not legally problematic."<sup>16</sup>

For example, the third party use of a photograph from a candidate's website does not constitute "republication," according to a majority of the current commissioners, even though the regulations do not expressly exempt this use. In MUR 5743, Commissioners Weintraub and von Spakovsky rejected the argument that the use of a photograph from a candidate's website in a third party mailer constituted "republication," concluding that to

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<sup>11</sup> Statement of Reasons of Commissioners David M. Mason, Bradley A. Smith, Karl J. Sandstrom, and Scott E. Thomas, Matter Under Review 4960 (Clinton for U.S. Senate Exploratory Committee), at 2.

<sup>12</sup> Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Matter Under Review 6056 (Protect Colorado Jobs), at 6, n.12.

<sup>13</sup> The ad does not meet any of the other criteria in the content prong, and the complaint does not argue otherwise. The ad is not an electioneering communication; it does not contain express advocacy or its functional equivalent; and it was not disseminated within 90 days of a primary or general election. *Id.* § 109.21(c).

<sup>14</sup> H.R. Conf. Rep. 94-1057, 59, 1976 U.S.C.A.N. 946, 974 (1976).

<sup>15</sup> *See, e.g.* MUR 2722 (American Medical Association) and MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee) (rejecting allegations of republication).

<sup>16</sup> Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 5879 (DCCC), at 5.

"treat an incidental republication of a photograph ... as an 'in-kind contribution' makes no intuitive sense."<sup>17</sup> In MUR 5966, Commissioners Hunter, McGahn, and Petersen reached the same conclusion, finding that the use of a photograph from a candidate's website in a third party television ad is not "republication," absent "some additional content or message" found in the photograph.<sup>18</sup>

Recently, the Commission dismissed two complaints involving allegations that third party groups "republished" candidate videos in their television ads. In MUR 5879, it was alleged that a Democratic Congressional Campaign Committee ("DCCC") ad featuring a 15-second excerpt of publicly available candidate b-roll footage was impermissible "republication." In explaining its vote to dismiss the complaint, three commissioners pointed to several factors. First, the ad was independent speech, which communicated the third party sponsor's own views rather than those of the candidate.<sup>19</sup> Second, the background footage was silent and "contain[ed] no discernible message" of its own.<sup>20</sup> Third, a contrary finding would hamper the ability of third party groups to run positive ads and "could perversely incentivize speakers to resort to the so-called 'negative advertising' that the sponsors of McCain-Feingold sought to discourage."<sup>21</sup> Relying on similar reasoning, three commissioners voted to dismiss a similar complaint against American Crossroads for the use of candidate footage in as much as half of a 30-second ad supporting Senate candidate Rob Portman.<sup>22</sup>

The DCCC and American Crossroads dismissals establish that the mere use of footage "to create [one's] own message" is not "republication" under the Act or Commission regulations.<sup>23</sup> Patriot Majority USA's use of the footage from the Chandler YouTube channel is materially indistinguishable from the uses made by the DCCC and American Crossroads. Patriot Majority USA obtained the excerpts from publicly available sources. And like the DCCC and American Crossroads ads, the Patriot Majority USA ad is not "anything close to a carbon copy" of the materials it used.<sup>24</sup> The excerpts appear on screen for less than half of the ad, and contain no discernible message of their own. They are mere background images, incorporated into "a communication in which [Patriot Majority USA] adds its own text, graphics, audio, and narration to create its own message."<sup>25</sup> Here, Patriot Majority USA's ownership of this message is underscored by

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<sup>17</sup> Statement of Reasons of Commissioners Hans von Spakovsky and Ellen Weintraub, MUR 5743 (EMILY's List), at 4.

<sup>18</sup> Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 5996 (Education Finance Reform Group), at 3.

<sup>19</sup> Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 5879, at 8.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 9.

<sup>22</sup> Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 6357 (American Crossroads).

<sup>23</sup> Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 5879, at 8.

<sup>24</sup> Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357, at 4.

<sup>25</sup> *Id.*

the fact that the organization ran nearly identical ads praising congressmen in two other districts, including one held by a Republican, at the same time that it ran the ad praising Rep. Chandler's position in Kentucky.

Finding a violation here, after not finding a violation in the DCCC and American Crossroads MURs, would raise serious due process concerns. Just this year, the Supreme Court affirmed that "[w]hen speech is involved," agencies must demonstrate "rigorous adherence" to two related principles: that "regulated parties should know what is required of them so that they may act accordingly" and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."<sup>26</sup> Since the passage of McCain-Feingold, the Commission has consistently dismissed complaints alleging that the mere use of campaign photos or videos as background images in third party ads was "replication." Patriot Majority USA relied reasonably on these precedents and engaged in materially indistinguishable conduct. As commissioners have noted on other occasions, "[p]roceeding in this case at this time would be unfair to [the respondent] because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against [respondent] but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances."<sup>27</sup>

Finally, we note that the application of the republication standard to find that Patriot Majority USA has made a contribution to the Chandler campaign has dubious statutory support. Under the Federal Election Campaign Act, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure ...."<sup>28</sup> Under the Supreme Court's recent decision in *Citizens United v. FEC*,<sup>29</sup> such an expenditure would not be illegal. FEC regulations interpret this statutory provision to treat the "replication of campaign materials" as an element of the "content prong" resulting in a contribution to the benefiting candidate.<sup>30</sup> It is not clear if the underlying statute can bear the weight of this regulatory interpretation, especially in the absence of coordinated conduct.

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<sup>26</sup> See *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012).

<sup>27</sup> Statement of Reasons of Chairman David M. Mason and Commissioners Darryl R. Wold and Bradley A. Smith, MUR 4994 (NY Senate 2000), at 3. See also Statement of Reasons of Karl J. Sandstrom, MURs 4553, 4671, 4407, 4544, and 4713, at 2 ("The respondents in this matter simply cannot be held to a standard that was not discernible prior to engaging in otherwise protected speech.").

<sup>28</sup> 2 U.S.C. § 441a(a)(7)(B)(iii).

<sup>29</sup> 130 S.Ct. 876 (2010).

<sup>30</sup> 11 C.F.R. §§ 109.21(c)(2), 109.23; see Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357 at 3, n. 6 (noting the "seeming incongruity" between the Act and regulations on this point). The Commission need not resolve the inconsistency here, however, because the advertisement does not constitute the "replication of campaign materials."

**CONCLUSION**

For the reasons set forth herein, the Commission should dismiss the complaint and close the file.

Very truly yours,



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Jonathan S. Berkon  
Counsel for Patriot Majority USA